IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

IN RE:	)	
SCOTT M. FAVRE AND	)	**CASE NO. 00-55067 ERG**
VANESSA W. FAVRE	)	
Debtors	)	**CHAPTER 7**
	)	

LYNDON PROPERTY INSURANCE	)	
COMPANY	)	
Plaintiff	)	
v.	)	**ADV. PROC. NO. 01-05138 ERG**
	)	
SCOTT M. FAVRE	)	
Defendant	)	

OPINION

The matter before the court is the Defendant Scott M. Favre's Motion to Reconsider Partial Summary Judgment and Amended Judgment Granting Partial Summary Judgment or in the Alternative to Set Aside Partial Summary Judgment and Amended Judgment Granting Partial Summary Judgment and to Reconsider the Opinion of the Court of January 31, 2006 (Dkt. #85). Also before the court is the Plaintiff Lyndon Property Insurance Company's Motion for Entry of a Final Judgment (Dkt. #77). Having considered the pleadings and memoranda submitted by counsel for the parties, the court concludes that the Debtor's Motion should be denied, and the Plaintiff's Motion for Entry of a Final Judgment should be granted.

I. FACTUAL BACKGROUND

Lyndon Property Insurance Company ("Lyndon") filed an adversary complaint against the debtor, Scott M. Favre to determine dischargeability pursuant to 11 U.S.C. § 523(a)(4) and (a)(6)

and objecting to discharge pursuant to 11 U.S.C. § 727. Lyndon filed its motion for partial summary judgment claiming entitlement to judgment as a matter of law pursuant to 11 U.S.C. § 523(a)(4) in connection with constructions bonds. The court granted the motion in its opinion dated January 31, 2006. The court concluded that the supporting documentation provided by Favre was insufficient to prove a genuine issue of material fact, noting that Lyndon had pointed out that affidavits were not sworn and certain documentation was not authenticated. The court subsequently entered an amended judgment granting partial summary judgment setting out the monetary award for the nondischargeable judgment.[1]

The Plaintiff, Lyndon, filed a Motion for Entry of Final Judgment, and the Debtor, Favre filed his Motion to Reconsider Partial Summary Judgment and Amended Judgment Granting Partial Summary Judgment or in the Alternative to Set Aside Partial Summary Judgment and Amended Judgment Granting Partial Summary Judgment and to Reconsider the Opinion of the Court of January 31, 2006. The parties filed briefs on the issues and submitted the matters to the court.

II. CONCLUSIONS OF LAW

The matters before the court are core proceedings under 28 U.S.C. § 157. The court has jurisdiction over the parties and the subject matter to these proceedings under 28 U.S.C. § 1334 and § 157.

The Debtor, Favre, has requested the court to reconsider its prior ruling based upon

[1] An appeal was filed on the matter and was later dismissed for failure to file a brief within prescribed time periods.

Federal Rules of Civil Procedure 56, 60 and 54(b).[2] He points out that Fed. R. Civ. P. 56(e) allows that, "The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits," and that Rule 56(f) allows the court to order a continuance to permit affidavits or discovery. The Debtor argues that equity demands that he should be given an opportunity to correct the failure to provide adequate and appropriate affidavits. Lyndon points out that generally such a request for extension under Rule 56(f) must be made before or at the time of the response to the motion for summary judgment. Lyndon further notes that Favre made no such motion for additional time and argues that, "to allow any party to avail itself of a Rule 56(f) continuance months after entry of judgment would make it virtually impossible to obtain a finality and would make summary judgment practice meaningless."

The Debtor also argues that, pursuant to Fed. R. Civ. P. 54, there has been no final order or judgment entered adjudicating all issues and that the court retains the right to revisit its opinion and order and to reconsider it or set it aside, and to allow affidavits to be supplemented. Lyndon agrees that Rule 54(b) allows the court to reconsider partial summary judgment, but that only limited circumstances justify reconsideration and that the power to revise an order should be used sparingly, citing *Christianson v. Colt Industries Operating Corp.,* 486 U.S. 800, 108 S. Ct. 2166, 2178(1988) (court's should be loathe to revise prior decisions in absence of extraordinary circumstances). Lyndon further points out that court's have held that reconsideration may be justified where there has been an intervening change of controlling law, new evidence, or the

[2] These Federal Rules of Civil Procedure are made applicable to this proceeding pursuant to Federal Rules of Bankruptcy Procedure 7056, 9024, and 7054.

need to correct clear error or prevent manifest injustice, citing *Pyramid, Lake Paiute Tribe of Indians v. Hodel,* 882 F. 2d 364 (9th Cir. 1989). *See also, Lamar Advertising of Mobile, Inc. v. City of Lakeland* 189 F.R.D. 480, 489 (M.D.Fla.1999). Lyndon argues that none of those grounds are present here, and that none are argued by Favre.

The Debtor further urges that Fed. R. Civ. P. 60(b) allows the court to relieve a party from a final judgment for mistake, inadvertence, surprise, or excusable neglect. The Debtor argues that the failure to provide sworn affidavits in support of the statement of material facts in response to summary judgment falls within this category. Lyndon argues that Rule 60(b) relief is only available for final judgments and not for judgments governed by Rule 54(b), citing *Balla v. Idaho State Bd. of Correction,* 869 F. 2d, 461, 466-67 (9th Cir. 1989) and *Fayetteville Investors v. Commercial Builders, Inc.,* 936 F. 2d 1462, 1473 (4th Cir. 1991). Rule 60(b) itself states that, "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding...". Fed. R. Civ. P. 60(b)(emphasis added). Lyndon also argues that mistakes of counsel do not provide a basis for relief under Rule 60(b)(1), citing *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.,* 6 F.3d 350, 357 (5th Cir. 1993).

The court agrees with these arguments and authorities cited by Lyndon and concludes that there has been no justifiable ground presented upon which the court should reconsider its prior ruling. The motion of the debtor to reconsider or to set aside the partial summary judgment should be denied.

Lyndon, as noted above, filed its motion for entry of final judgment pursuant to Federal Rule of Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 54. Lyndon states in its brief the following:

> One of Lyndon's claims against Favre (the 523(a)(4) claim), has been fully adjudicated. The other claim, the false oath claim, is pending and active. Generally, a matter is not final and ripe for appeal until all claims of all parties have been fully adjudicated. However, Rule 54(b) makes exception to this rule and permits the Court to, in effect, sever and adjudicate one claim from the remainder of an action:
>
> > If the Court enters an order finally disposing of one or more claims or the claims by or against one or more parties, and that order would be appealable in an action presenting only those claims, the district court has the discretion to 'dispatch' the order for immediate appeal.
>
> *Moore's Federal Practice* 3d, [Vol. 10] p. 54-37.

Lyndon Property Insurance Company's Memorandum in Support of its Motion for Entry of a Final Judgment and in Opposition to Scott M. Favre's Motions to Reconsider or Set Aside Partial Summary Judgment at 2. Fed. R. Civ. P. 54(b) provides, in part, that:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Fed. R. Civ. Pro. 54(b). Lyndon avers that:

> The leading case interpreting this standard is *Curtiss-Wright v. General Electric Co.,* 100 S.Ct. 1460, 446 U.S. 1 (1980). In *Curtis-Wright,* summary judgment was granted by the District Court on one of the plaintiff's claims. Since the plaintiff's other claims were open for adjudication, the plaintiff moved for entry of judgment under Rule 54(b). The District Court granted plaintiff's Motion, emphasizing that the claims left for adjudication were separate and distinct from the claim already decided and that, therefore, piecemeal or duplicative appellate review would not occur.

Lyndon's Memorandum at 2-3. *See also, Tubos de Acero Mexico, S.A. v. American International Invest. Corp., Inc.,* 292 F. 3d 471 (5th Cir. 2002)(breach of contract claim constituted a distinct claim for relief and court's ruling was suitable for entry as a final judgment under rule 54(b)).

Lyndon makes the following argument:

> In this case, the facts and legal issues underlying the defalcation claim and the false oath claim are sharply distinct and in no way overlap. Indeed, none of the facts or legal issues involved in the defalcation claim - Favre's control and disposition of contract trust funds - have any connection to the false oath claim. That claim is based on information contained in statements made in Favre's bankruptcy schedules and Favre's knowledge and intent with respect to those statements. If there were, in fact, successive appeals of these claims, there would be no risk in the appellate court duplicating its reviews of these issues.

Lyndon's Memorandum at 5.

The court agrees that the § 523(a)(4) claim has been fully adjudicated and that there is no reason to delay entry of a final judgment as allowed pursuant to Fed. R. Civ. P. 54(b). Lyndon's Motion for Entry of Final Judgment should be granted.

An order will be entered consistent with these findings and conclusions pursuant to Federal Rule of Bankruptcy Procedure 9021 and Federal Rule of Civil Procedure 58. This opinion shall constitute findings and conclusions pursuant to Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52.

DATED this the September 27, 2007.

/s/ Edward R. Gaines
EDWARD R. GAINES
UNITED STATES BANKRUPTCY JUDGE

ATTORNEY FOR PLAINTIFF-DEBTOR:
David L. Lord
David L. Lord and Associates, P.A.
2300 24th Avenue
Gulfport, MS 39501

ATTORNEY FOR DEFENDANT-LYNDON PROPERTY INSURANCE COMPANY:
Robert Gambrell
Gambrell & Stone, PLLC
P.O. Drawer 4999
Biloxi, MS 39535